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Lau, Ulrich/Lüdke, Michael: *Exemplarische Rechtsfälle vom Beginn der Han-Dynastie – Eine kommentierte Übersetzung des Zouyanshu aus Zhangjiashan/Provinz Hubei*. Tokyo: Research Institute for Languages and Cultures of Asia and Africa (ILCAA), 2012, 365 pp., ISBN 978-4-8633-7099-9.

Since the publication of Hulsewé's pioneering work on Han law in the 1950s,[1] our knowledge of the subject has been revolutionized through the discovery in archaeological excavations of numerous texts dealing with the laws of the Qin and Han dynasties from around the third century BCE to the second century CE. The earlier discoveries, made in 1975, brought to light a wide variety of legal texts of the fourth and third centuries BCE concerning the laws applied in the Qin state and empire. A good translation into English, with commentary, has been available since 1985.[2] Later discoveries include a good deal of legal material relating to the Han as well as the Qin. One of the most important of these finds comprised both a collection of statutes promulgated in 186 BCE (*Ernian lüling*) and a collection of cases from the early years of the Han, a few even predating the Han (*Zouyanshu*). These cases or precedents are in the main concerned with doubtful points of law decided by the highest court.

The procedure for handling "doubtful cases" was established at the very beginning of the Han dynasty by Gaozu in an edict of 200 BCE. This edict provided that, where a prefecture experienced a doubt in establishing the correct punishment for an offence, the matter was to be referred to the next highest administrative level, the commandery. If the commandery was still in doubt, the matter was to be referred to the highest court of the empire, that of the commandant of justice (*tingwei*) in the capital. If even this court could not come to a decision, there was an ultimate reference to the throne.[3] It is hardly a coincidence that a

1 Hulsewé 1955.

2 Hulsewé 1985. One should note also the discovery in 1986 of texts relating to the law of Chu in the fourth century BCE. Some account of these laws can be found in Weld 1999.

3 Some fifty years later an edict of emperor Jing clarified "doubt" by stating that it comprised not only uncertainty as to which penal statute was relevant but also uncertainty as to whether the punishment provided by the relevant statute was in all the circumstances of the case equitable. See Hulsewé 1955: 343–344.

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collection of "doubtful cases", providing models for future investigations, should appear within a few years of the Han founder's edict.

The bamboo slips containing the *Ernian lüling* and the *Zouyanshu* were first properly transcribed, edited, and published in 2001. Since then there have been numerous studies in Chinese and Japanese, relatively few in a Western language. Only a few cases have been translated into English.[4] The work under review, the importance of which cannot be overstated, is the first to offer a complete translation into a Western language of the *Zouyanshu*. A model of exemplary scholarship, the book has a comprehensive introduction not just on the nature of the cases contained in the *Zouyanshu* but also on the principles that characterized Qin/Han penal law in general. The core of the book is the text and translation of the twenty cases of the *Zouyanshu*, each translation enriched with a detailed historical, philological, and legal commentary. Useful appendices summarise the fundamental procedural steps in a trial and list inter alia the legislation (statutes (*lü*) and ordinances (*ling*)) cited in the cases.

The introduction alone is probably the best concise account in a Western language of the legal procedure and general principles of Qin and early Han law. Apart from giving a thorough account of the finding and editing of the bamboo slips that compose the *Zouyanshu*, the authors describe in detail both the way in which legal proceedings were conducted in courts of all levels and the criteria for the review of a case by the highest court in the capital (that of the *tingwei*) or even by the emperor himself. The most important ground for referral of a case was a doubt either as to which of a number of statutory rules best applied to the facts or as to the interpretation of a particular rule.[5] But "doubt" was not the only ground of referral. In particular, the rank of the person accused as well as the gravity of the offence constituted other grounds (cases XIV, XV, and XVI). In one case (XVII), a person of low status who had been convicted of theft and sentenced to hard labour was permitted to have his conviction reopened on the ground that his confession had been (wrongly) extracted by torture.

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4 Case XXI has been translated with a full commentary by Nylan 2005–2006. There is a translation of case XVII in Csikszentmihalyi 2006: 29–35. An important study by M. Korolkov translates large parts or gives substantial summaries of cases I, II, III, XVII, XVIII, and XXII. See Korolkov 2011. Michael Loewe has summarised case XVIII in Loewe 2006: 131–133. Three cases on absconding slaves (II, V, and VIII) are summarised by R. Yates 2014.

5 One probably should bring out more clearly than do the authors (9 n32) the very different concept of "doubtful offences" in the Tang code (article 502), where the reference is to a doubt as to the facts not the law.

The introduction further offers an illuminating account of two fundamental characteristics of Chinese criminal law, that endured throughout the whole history of the criminal law until the end of the Qing. These are the so-called "subjective" element in crime, that is, the relevance of the perpetrator's intention or knowledge to the commission of the offence, and the notion of "collective liability", that is, the ways in which persons other than the actual perpetrator were involved in liability. The authors properly distinguish between two types of joint or collective liability: the liability of persons who are guilty in the sense that they have conspired with, assisted, or concealed the person who committed the offence and the liability of persons, themselves innocent, who are made guilty by association, such as relatives, neighbours, or official colleagues.

The language of the cases included in the *Zouyanshu* is both technical and extremely concise. Hence a great deal of explanation is required to make the facts and the reasoning of the investigators fully intelligible. The authors supply this help through both summaries prefacing the translation of each case and an extensive apparatus of footnotes. The latter not only deal with the numerous philological problems raised by the text but provide extremely useful information on the content of the laws cited in the cases. Many of these laws can be found in the *Ernian lüling*, promulgated ten years after the date of the latest case in the *Zouyanshu*. One is thus enabled to see the continuity in legislation from the Qin to the first decades of Han rule.

The twenty two cases of the *Zouyanshu* all illustrate different and important aspects of procedure: the methods of investigation and interrogation, confrontation of the accused with the evidence against him, identification of relevant laws, the conditions under which torture might be employed, and the appropriate grounds for review of a decision by higher authorities.[6] The focus of the investigation, as emerges very clearly from a reading of the cases, was the necessity not just to establish the true facts and identify the relevant laws but to do so in such a way as to obtain from the accused an acknowledgment of guilt. Without such an admission it does not appear that judgment could be pronounced.

The reasons for the final judgment are never stated in the documents. Sometimes these reasons can be gathered from the record of earlier proceedings in which the arguments for a particular interpretation of the law have been advanced by a lower court. The final judgment need not have been the

6 The principles of investigation illustrated by the decisions agree with those stated in a model for the conduct of interrogations in trials found in the Qin legal documents from the third century BCE. See Hulsewé 1985: 183–184 (E1, E2).

unanimous opinion of all the judges making up the highest court under the direction of the *tingwei*. In some cases (I, II, and XXI) we have references to differences of opinion among the judges.

The cases differ considerably in the interest they have for the substantive law. A number deal with regulations, intrinsically of a temporary nature, devised for the handling of problems arising from the Qin-Han transition such as the treatment of absconding slaves (II, IV, and VIII), the relationship between the central state and the semi-independent kingdoms, created on the establishment of the Han but dissolved by the middle of the second century BCE (III), and the military obligations of ethnic minorities or other matters of military law (I, XVIII). But some cases certainly make significant points about the interpretation of statutes that formed part of the permanent laws of the Han and later dynasties.

First, we have an important decision which utilises a distinction central in the whole history of the traditional penal law, that between wounding or killing in a fight (*dou shang/sha*) and intentional wounding or killing (*gu (zei) shang/sha*). Where a suspected criminal resisted arrest and wounded or killed the person seeking to arrest him, the codes of all dynasties treated the offence not as wounding or killing in a fight but as intentional wounding or killing. But what was the position where the suspected person was in fact innocent, and conscious of this fact, put up a resistance which resulted in the injury or death of the arrester? In 197 BCE the court of the *tingwei* held that innocence made no difference. The person arrested, even though he had not committed the offence for which he was sought, was still to be sentenced on the basis of intentional wounding/killing and not on the basis of wounding/killing in a fight (case V).

Several cases concern the offence of "falsification of documents" (*wei shu*) (IX, X, XI, XII), of which the most interesting is case XII. Here a minor official, employed in the courier service, delayed a despatch beyond the permitted time for forwarding it. He attempted to conceal the delay by altering the date on the covering document. Although the despatch itself had not been altered, he was still convicted by the highest court of the offence of "falsification of documents". Another case (VII) extends the offence of "offering or taking bribes and subverting the law" (*shou xing qiu wang fa*), normally applicable in the context of official misbehaviour (see case XIII), to a woman who was bribed by a fugitive slave not to proceed with his prosecution as required by law.

Probably the most intriguing of the decisions reported in the *Zouyanshu* is that, probably from the Qin period, in which a woman was prosecuted for the offence of illicit sexual intercourse committed during the funeral rites for her husband (case XXI). No straightforward conviction appears to have been

possible because she had not been caught and denounced *in flagrante delicto*.[7] The highest court, anxious to hold the woman liable for so grave a violation of ritual propriety, constructed an elaborate process of reasoning under which she was held to have committed the offence of lack of filial piety of the second grade. Lack of filial piety of the first grade was disrespect and disobedience to parents, warranting death. Lack of filial piety of the second grade consisted of disrespect directed at one's husband and warranted the punishment of tattooing and forced labour. This ruling is of great interest since it appears to be the only time in a legal context in which lack of filial piety is invoked as an offence against a husband. Unfortunately for the judges, a court official, not present at the hearing, returned and argued convincingly that the difference between a living and a dead husband was crucial. Since in this case the act of illicit sexual intercourse had taken place after the husband's death, it could not be construed as an act of disrespect to him. Hence the widow could not be convicted and sentenced in the manner proposed by the court. The judges accepted the argument and declared their own judgment to have been mistaken.

On a few matters touched on by the authors it is possible to express some reservation. One such matter is the authors' invocation of talio as a description of the Qin/Han system of punishment (71). Although early Chinese law punished homicide with death and physical injury with some form of mutilation (amputation of nose or foot), it is difficult to see in this an example, strictly speaking, of talio. The essence of talio is that a like injury should be inflicted on the person who had inflicted it (eye for an eye and so on). Such a relationship between injury and response never characterised Chinese law.

From time to time the authors refer to the "Confucianization of the law", a process by which the law of the state gradually came to incorporate elements of Confucian morality. Whatever may have been the position under the Tang and Sung dynasties, it is in fact highly doubtful whether the Han knew any process of legal change which could be subsumed under the head of "Confuzianization of the law". Even the term "Confucian" as a general description of moral attitudes[8] is not necessarily appropriate at this time.[9]

There is some difference of opinion on the scholarly literature on the reasons for the inclusion of case XXII in the collection. The authors argue that

7 A different view is offered by Nylan in the essay cited in note 4 above. Oddly, the authors, although they include the essay in the main bibliography, pay no attention to it in their translation of the case.

8 In one note (1436) the authors, probably rashly, explain the term *ru* as "Confucian".

9 The difficulties with the process described as "Confucianization of the law" are discussed in detail in MacCormack 2008.

its appearance is due to the excellence of the methods of investigation which it displays. Hence it was selected to serve as a model for later officials in the conduct of an investigation. However, Korolkov cites the case primarily as an example (in contrast to case XVII) of the proper application of torture in an investigation.[10]

More can perhaps be extracted from case XIX than the authors suggest. This is one of the two decisions allegedly from the period of the Spring and Autumn (771–464 BCE) contained in the *Zouyanshu*. It concerned the discovery by the ruler of the state of Wei of a hair in his soup and a blade of grass in the food prepared for his wife. The record of the case reports the statesman entrusted with the sentencing of the offence as arguing that the intrusion of impurities in the ruler's food was not the fault of the cooks or serving maids. The hair had dropped into the soup from a whisk used to fan the ruler while he was eating. The blade of grass had originated in the damaged rush mat of the serving maid and become attached to her worn out gown from which it had descended into the food of the ruler's wife.

The authors treat the decision as an example of a particular form of investigation rather than of the interpretation of a rule of law. It is perfectly possible, however, that we do have in the case a problem raised by the wording of the statute cited at the beginning of the report: "who in the preparation of food for the ruler or his wife has not been careful is to be condemned to death".[11] The central issue was the meaning of the phrase *bu jin* (not careful) in the Wei statute, which may have imposed a very high standard of care on the cooks and servitors concerned with the ruler's food. The investigator's uncovering of the circumstances in which the impurities had entered the food showed that there had been no breach of this standard.

The other case from the Spring and Autumn (XX) also prompts further reflection. It is of great interest for the development of law during the Spring and Autumn because it cites at least part of the statutes of the state of Lu concerned with theft. The authors suggest that the case was included in the *Zouyanshu* as an illustration of the basic principles underlying the law.

10 Korolkov 2011: 63–65. This study (see note 4) probably appeared too late for consideration by the authors.

11 Rules of this kind were common in the principalities and kingdoms of the pre-imperial period. To the references given by the authors (n1342) can be added *Lunheng jijie* (Liu Pansui (ed.), Taipei, 1975), 1, 119 (book 6), translated in Forke 1962: 156. This work describes a case in which king Hui of Chu (487–430 BCE) found a leech in his salad, a capital offence on the part of those responsible for preparation of the ruler's food. The Tang code (article 103) punished with penal servitude for two years the appearance of "unclean articles" in the emperor's food: Johnson 1997: 73.

The statute quoted at the beginning of the document, if taken literally, shows that the state of Lu already in the fifth, if not the sixth, century BCE possessed rules punishing theft similar to those in force at the beginning of the Han. Theft was to be punished with a fine or a period of forced labour, the severity of which depended upon the value of what was stolen.[12] The nub of the decision is the sentence of a minor official to a punishment more severe than that warranted by the value of the grain he had stolen from the state. The judge in effect justified the higher punishment on the ground that the offender had not exhibited the standard of behaviour expected of him as an official and scholar.

One might say, as do the authors, that the judge is here invoking a basic principle of morality underlying the law. But it is also possible that we have here the beginning of that process of legal reasoning which culminated in later law in the enactments of rules imposing on officials who stole from the government a higher degree of liability than that imposed on an ordinary person who stole property of the same value.[13]

Generally, we can say that in their meticulously documented and tightly written study the authors offer an enormous amount of information with respect to the development of the law at one of the critical junctures in Chinese legal history, the Qin-Han transition. It is to be hoped that the publication of an accompanying translation of the *Ernian lüling* will not be long delayed.

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12 The authors, without detailed reasons, treat the statute as fictitious (n1410).

13 Case XV cites a decree of Gaozu which deprives an embezzling official of the privilege of a reduction in sentence to which his rank would otherwise have entitled him. During the Han, draconian decrees were issued for the punishment of officials who stole from the state: see Hulsewé 1988. The Tang code contained an article (283) punishing supervisory or custodial officials who stole government property entrusted to their care two degrees more severely than ordinary theft (Johnson 1997: 293).

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